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**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
| | ) | |
| Implementation of the Cable | ) | CS Docket No. 97-248 |
| Television Consumer Protection | ) | RM No. 9097 |
| and Competition Act of 1992 | ) | |
| | ) | |
| Petition for Rule Making of | ) | |
| Ameritech New Media, Inc. | ) | |
| Regarding Development of Competition | ) | |
| and Diversity in Video Programming | ) | |
| Distribution and Carriage | ) | |



## REPLY COMMENTS OF VIACOM INC.

Viacom Inc. ("Viacom") hereby submits its reply comments in response to comments filed in connection with the Notice of Proposed Rule Making ("Notice") in the above-captioned proceeding. Viacom owns and operates several basic and premium cable networks,[1] which are distributed by cable television systems, direct broadcast satellite (DBS) service providers, wireless cable (MMDS) operators, satellite master antenna television (SMATV) systems, open video system (OVS) operators and home satellite dish (TVRO) distributors. Viacom holds no ownership interest in any cable system and no cable operator holds any interest in Viacom.[2] In light of its status as a non-vertically integrated satellite cable programming vendor, Viacom

[1] Viacom, through affiliates, owns and operates: the premium program services Showtime, The Movie Channel and FLIX; the basic program services Nickelodeon (comprising the Nickelodeon and Nick at Nite programming blocks);

restricts its reply comments to those commenters seeking to amend the Commission's program access rules so as to cover all, not just vertially integrated, satellite cable programmers.

## I. The Plain Language and Legislative History of Section 628 Support Application Only To Vertically Integrated Programmers.

In the Notice, the Commission expressly declined to seek comment on extending to non-vertically integrated programmers the rules implementing Section 628[3] —the program access provisions— of the Communications Act, as amended by the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act").[4] The Commission did so because it found that there is not "sufficient evidence of a problem" to warrant further inquiry.[5] This is not the first time that the Commission has rejected calls for expansion of the program access rules to non-vertically integrated programmers. On at least two other occasions the Commission has found no basis for recommending such action.[6] Moreover, as more fully discussed below, in light of the plain language of Section 628 and its legislative history, the Commission lacks the legal authority needed to extend the program access rules to any satellite cable programmer other than one that is vertically integrated.

Nevertheless, several commenters ignore the Commission's directive, and the statute itself, and indicate their desire that the Commission should and could expand the program access

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MTV: Music Television, VH1/Music First, Nick at Nite's TV Land and M2: Music Television. Viacom, through affiliates, also holds partnership interests in Sundance Channel, Comedy Central and All News Channel.

[2] Viacom divested its cable systems in July 1996.

[3] Section 76.1000 et. seq. of the Commission's Rules.

[4] Notice of Proposed Rule Making in CS Docket No. 97-248 at par. 36.

[5] Id.

[6] See, e.g., Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Third Annual Report, CS Docket No. 96-133, pars. 153-157, (rel. Jan 2, 1997); Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Second Annual Report, CS Docket No. 95-61 (rel. Dec. 11, 1995).

rules.[7] Two commenters, RCN Telecom Services Inc. ("RCN") and The Wireless Cable Association International, Inc. ("WCA"), separately name Viacom as one of several non-vertically integrated programmers whose programming should be encompassed by any revised program access rules. Specifically, RCN laments Viacom's non-vertically integrated status and complains that in "separating programming from distribution, Viacom removes its programming from the rubric of the program access rules."[8] And WCA asserts that the Commission has authority under the 1992 Cable Act to redefine a vertically integrated programmer and intimates that the Commission should issue yet another Notice in order to determine whether attribution standards should be modified to encompass, among others, "former cable operators," such as Viacom.[9]

As detailed below, Viacom believes that extension of the program access rules to *all* cable programming —including that which is the product of non-vertically integrated programmers— is unnecessary, unwarranted and unsupported by either the plain language or the legislative history of Section 628. Moreover, there is no rational basis in fact or law for contorting the program access attribution rules to encompass programmers that once were, but are no longer, owners of cable systems. Finally, were the Commission to extend the program access restrictions to non-vertically integrated programmers, fledgling cable networks, such as Viacom's TV Land, might not survive, and the congressional goal of competition and diversity of programming would be undermined.

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[7] See, e.g., Comments of Consumers Union, Consumer Federation of America and Media Access Project at 9-10; GTE at 7, n.19; and World Satellite Network, Inc. at 24-26.

[8] Comments of RCN at 17.

[9] Comments of WCA at 5-6.

### A. The Commission Lacks the Authority to Expand the Program Access Rules to Cover Non-Vertically Integrated Programmers.

Section 628 expressly applies to satellite cable programming vendors in which a cable operator has an "attributable interest." An "attributable interest," in turn, necessarily involves some level of current ownership interest or some level of *de facto* or *de jure* control between affiliates.[10] Indeed, the congressional findings upon which the law is based make clear that Congress sought to remedy discrimination by programmers which are "vertically integrated" or which are "affiliated with" cable operators.[11] Congress' intent in adopting Section 628 was to curb incentives for influencing the behavior of affiliates to the detriment of competitors.[12] Absent ownership and/or control relationships between a cable programmer and a cable operator, a programmer plainly has no incentive to favor its cable operator affiliate —because no such affiliation exists. Given the plain language and legislative history of Section 628, therefore, it is clear the Commission has no statutory authority to apply program access provisions across-the-board to *all* satellite cable programming vendors.

Accordingly, rather than denounce Viacom for divesting its cable systems, RCN should laud Viacom for doing exactly what Congress and the FCC have encouraged: Viacom decoupled its distribution systems from its programming services and thereby eliminated all potential anticompetitive incentives to favor its own cable affiliates to the detriment of competitors. In fact, Viacom profits from greater competition, which results in more distributors for its programming services. As a satellite programmer with no cable ownership, Viacom has no competitive reason to withhold its established programming from any distribution platform. In fact, even though the program access rules have not applied to Viacom since the divestiture of its

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[10] See, e.g., Section 73.3555 of the Commission's Rules, 47 C.F.R. §73.3555, the attribution rules which were in place for broadcast ownership purposes at the time the 1992 Cable Act was enacted. Although the Senate version of the program access rules incorporating those referenced rules was not adopted, "attributable interest" clearly is a Commission term of art predicated upon relationships tied to ownership and/or control.

[11] See, House Committee on Energy and Commerce, H.R. Rep. No. 102-628 (House Report), 102d Cong., 2d Sess. (1992); Senate Committee on Commerce, Science, and Transportation, S. Rep. No. 102-92 (Senate Report), 102d Cong., 1st Sess., 24-29 (1991); House Committee on Energy and Commerce, H.R. Rep. No. 102-862 (Conference Report), 102d Cong., 2d Sess., 92-93 (1992).

[12] See Senate Report at 24; House Report at 41-45.

cable systems in 1996, Viacom has continued to sell all of its established, mature cable services, such as Nickelodeon, MTV, VH1, Showtime and The Movie Channel to all distribution technologies.

### B. A Programmer's Former Status Is Irrelevant Under Section 628.

With respect to WCA's suggestion that the Commission circumvent the vertical integration requirement of the program access law by redefining Commission attribution rules so as to cover a "former cable operator," Viacom submits that such maneuvering not only would be irrational, but it would be arbitrary and capricious and inconsistent with the plain language and congressional intent of the law. It defies economic theory to imply that a *former owner* of a cable system has a financial motive to favor a *current owner* of a cable system. Indeed, WCA does not and cannot provide any evidence that former ownership interests alone affect a programmer's present economic incentives. Yet, WCA would have the Commission label a programmer in perpetuity as vertically integrated —and thereby require application of rules meant to address a completely unrelated set of facts —even though the programmer has divested its cable holdings. To craft such a rule, rendering an entity's former ownership interests as determinative of its coverage under the program access provisions today, would constitute the equivalent of an illegal bill of attainder which targets Viacom. Thus, the Commission must dismiss WCA's request to contort the program access attribution rules so as to encompass entities Congress plainly determined should not be covered by the program access provisions.

### C. Expanding the Program Access Rules to Cover Non-Vertically Integrated Programmers Would Thwart Competition and Diversity in the Programming Marketplace.

Commenters calling for application of the program access rules to all program suppliers in order that alternative MVPDs may better compete with cable operators ignore one of two express objectives of Section 628. While one of the purposes of the statutory program access provisions, as specified under Section 628(a), is to spur the development of competition to

traditional cable systems, a commensurate goal is to increase competition and diversity in the multichannel video programming marketplace.[13] That diversity of programming is an integral goal of the statutory program access provisions is underscored by its inclusion in Section 628(c)(4)(D), which sets forth the factors to be considered by the Commission in determining whether an exclusive contract between a vertically integrated programmer and a cable system would serve the public interest.[14]

Were the Commission to extend the program access rules to non-vertically integrated programmers, competition and diversity in the multichannel programming marketplace —one of the dual congressional objectives of the statutory program access provisions— would certainly languish. That is because independent, non-vertically integrated programmers would be stripped of their ability to employ the tool of exclusivity even on a limited basis. As the Commission noted when it implemented Section 628, "the public interest in exclusivity in the sale of entertainment programming is widely acknowledged."[15] Exclusivity can be useful in garnering the critical mass of subscribers needed to undertake the costly[16] and risky launching of new and diverse mass market, national cable networks. Absent some limited use of exclusivity, independent programmers in this highly competitive marketplace would be forced into attempting to convice cable systems to carry their new networks by other means. Historically, such means have included being forced to give up an equity stake or paying exorbitant per-

[13] See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in Video Programming Distribution and Carriage in MM Docket No. 92-265 ("First Report and Order"), 72 RR 2d 649, 649 (1993). Section 628(a), titled "Purpose," states: "The purpose of this section is to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market, to increase the availability of satellite cable programming and satellite broadcast programming to persons in rural and other areas not currently able to receive such programming, and to spur the development of communications technologies."

[14] It is significant to note that Congress did not flatly proscribe grants of exclusivity by vertically integrated programmers to cable operators unless such contracts prevent MVPDs from obtaining such programming for distribution in areas not served by a cable operator as of the date of enactment of Section 628. See Section 628(c)(2)(C).

[15] First Report and Order at par. 63.

[16] The Commission recently has noted that the costs of launching a new cable network run from $100 to $125 million or more and that new networks generally operate at a loss for a number of years. Annual Assessment of the Status of Competition in Markets for the Delviery of Video Programming, Fourth Annual Report, CS Docket No. 97-141, par. 165 (1998).

subscriber fees for carriage. The first option would lead to the undesired effect of an increased level of vertically integrated programming and both options undoubtedly would make the launch of a new cable network much more risky and expensive.

It is a fact that in today's programming distribution marketplace cable operators serve the requisite base of subscribers vital to a successful launch of a cable network. But cable systems have limited channel capacity and new independent program services can be severely disadvantaged as a result. For example, in vying for channel space in this competitive marketplace, the carriage of new independent program services is considered only after must-carry and retransmission consent broadcast signals, PEG channels, leased access channels, affiliated program services and established independent program services all have been accommodated. Therefore, in order to compete for this limited channel space for carriage of their new, untested networks, independent programmers must in some cases provide cable operators with incentives, such as exclusivity. In exchange for exclusivity, the independent cable programmer not only obtains carriage, but benefits tremendously from the cable operators' marketing and promotional efforts touting the new networks. Were all MVPDs to be offered equal access to new networks, it is less likely that any one such MVPD would be committed and motivated to market and promote this sort of untested programming when it is also carried by their competitors. And without promotion and marketing, a start-up network will fail.

For the very reasons discussed above, Viacom has used exclusivity on a limited basis (only terrestrially) and for a limited time to gain distribution for and recognition of its start-up TV Land service, which it launched in 1996. Through this short-lived mutually beneficial arrangement with cable operators, TV Land will evolve into a viable network. Viacom looks forward to the day when TV Land, like its mature sister networks, will be established with a solid base of viewers so that it, too, will be licensed for carriage by the full panoply of competitive program distributors.

## II. Conclusion.

For the foregoing reasons, Viacom respectfully requests that the Commission abide by its initial determination in the Notice and decline consideration of comments urging expansion of the program access rules to non-vertically integrated programmers. The Commission stated in the Notice that it has "no sufficient evidence" of a problem to recommend further inquiry on the issue of extending the program access rules to non-vertically integrated programmers. While certain commenters ignored the Commission's directive and attempted to provide evidence warranting expansion of the program access rules, Viacom submits that such evidence remains lacking and that continued exclusion from the rules of non-vertically integrated programmers will serve Congress' goal of fostering competition and diversity in the video programming marketplace.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

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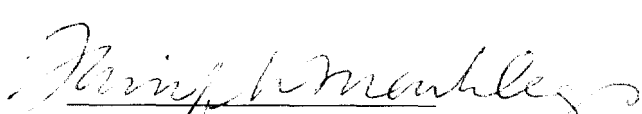

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